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No. 97-1625

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA DENTAL ASSOCIATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN DENTAL ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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85 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND LEGISLATIVE HISTORY

AGENCY DECISION

OTHER AUTHORITIES

INTEREST OF THE AMICI

Amicus American Dental Association ("ADA") is the oldest and largest national association of dentists in the United States. It is dedicated to furthering the education and training of dentists so that they may fulfill their "overriding obligation . . . to provide quality care in a competent and timely manner." See ADA, *Principles of Ethics and Code of Professional Conduct* 1 (1995).[1] Through the ADA, members of the profession also carry out the "privilege and obligation of self-government," *id.*, including the promulgation of ethical guidelines. The ADA's strong interest in responsible self-regulation in the dental profession will be undercut unless the decision of the Court of Appeals is reversed.

The National Society of Professional Engineers ("NSPE") is an individual professional membership association of over 60,000 licensed engineers practicing in government, industry, education, construction and private practice. Its mission is to promote the ethical, competent and licensed practice of engineering. Through its many programs, NSPE helps establish educational and licensure standards for the protection of the public health and safety. Its *Code of Ethics for Engineers* encourages all engineers to practice consistent with those standards. NSPE's interests in self-regulation and in promoting the interests of the public will be undermined if the decision of the Court of Appeals is not reversed.

The American Society of Association Executives ("ASAE") is a not-for-profit, tax-exempt organization which, since its

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the consent letters have been filed with the Clerk of the Court.

founding in 1920, has been dedicated to improving the performance and effectiveness of voluntary membership organizations, enhancing the professionalism of association executives, and encouraging participation by association executives and their associations in public policy issues. ASAE members -- approximately 24,000 association executives and staff, as well as representatives of suppliers of goods and services to the association community -- manage charitable and philanthropic organizations, professional societies, and trade associations. Many of these groups are professional societies that develop and issue ethical standards and guidelines for their members.

SUMMARY OF ARGUMENT

This case presents a question which this Court has previously considered but did not resolve: Whether the Federal Trade Commission ("FTC") has jurisdiction over nonprofit, professional associations. See *American Medical Ass'n ("AMA")* v. *FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982). The petition for certiorari gives this Court another opportunity to settle this recurring question. The petition also presents an issue of antitrust law that is important to all entities, but particularly important to professional associations which strive to develop ethical positions designed to benefit consumers: Whether the so-called "quick look" rule of reason analysis is properly employed to strike down ethical guidelines directed against deceptive practices without any serious analysis of the competitive significance of those guidelines. Both of these issues merit review by this Court.

1. In stark contrast to the sweeping language of the contemporaneously enacted Clayton Act, the FTC Act expressly limits FTC jurisdiction to corporations "organized to carry on business for [their] own profit or that of [their] members." 15

U.S.C. § 44. Nothing in the language or in pertinent legislative history indicates that Congress intended to give the FTC jurisdiction over nonprofit, professional societies. Rather, Congress vested antitrust authority over these entities exclusively in the federal courts enforcing the Sherman Act. Part I.A.

The court below failed to determine whether petitioner California Dental Association ("CDA") is "organized to carry on business for . . . profit." Instead, it considered only whether the CDA "provides tangible, pecuniary benefits to its members." 128 F.3d at 726. This faulty inquiry does violence to the plain meaning of the word "profit" and ignores the limiting effect of the statutory phrase "organized to carry on business for." Part I.A.

The court of appeals acknowledged that the scope of FTC jurisdiction over nonprofit, professional associations has divided the courts of appeals. See 128 F.3d at 725-26. Its decision is consistent with that of the Second Circuit in *AMA* v. *FTC*, but is squarely in conflict with the decision of the Eighth Circuit in *Community Blood Bank of Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011 (1969). That case correctly recognized that an association is not a business carried on for profit because its activities confer some incidental economic benefit upon its members. Part I.B.

Resolution of the conflict among the courts of appeals is of great importance to nonprofit, professional associations and to the public. In recent years, the FTC has devoted substantial resources to public and nonpublic investigations of such entities, diverting the attention and funds of professional associations from their nonprofit activities and discouraging responsible efforts at professional self-regulation. Part I.C.

2. This Court should also grant the writ in order to resolve the conflict between the decision below and precedent of this Court and the courts of appeals regarding the proper application of the "quick look" rule of reason analysis in antitrust cases. The Ninth Circuit used quick look analysis to condemn canons of professional ethics as anticompetitive without undertaking any serious economic analysis of their competitive significance despite the procompetitive purpose and effect of these canons. This approach is inconsistent with this Court's decisions which make clear that the quick look approach is confined to the exceptional circumstance in "'which no elaborate industry analysis is required to demonstrate the anticompetitive character'" of an inherently suspect restraint of trade. See *NCAA* v. *Board of Regents*, 468 U.S. 85, 109 (1984)(citation omitted).

At issue here are ethical positions which require certain disclosures to prevent deception in price advertising and which provide that certain nonverifiable claims of quality service are deceptive. Far from being naked restraints of trade, the guidelines are supported by strong procompetitive justifications, most notably the necessity of ensuring accurate information in the marketplace. This Court has already indicated that, given "[t]he public service aspect, and other features of the professions," *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), courts must closely scrutinize professional ethical guidelines challenged as restraints of trade. This Court's jurisprudence makes plain that any such rule which is not a naked restraint of trade may not be invalidated after only a quick look. Part II.A.

The decision below, moreover, cannot be reconciled with decisions of this Court recognizing that professional ethical rules that prohibit misleading or deceptive advertising are procompetitive. Professional associations "have a special role to play" in preventing misleading or deceptive professional

advertising, *Bates* v. *State Bar*, 433 U.S. 350, 384 (1977). Indeed, this Court has noted that ethical rules governing professional advertising that require additional disclosures (instead of prohibiting speech) and that ban unverifiable claims serve procompetitive purposes. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In addition, ethical rules that prevent inaccurate advertisements are procompetitive because they make professional services more attractive to a public increasingly cynical about professional claims and conduct. *Cf. Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995). Part II.B.

The decision below also conflicts with decisions of other courts of appeals which recognize that the quick look analysis is appropriate only in those narrow circumstances in which a restraint is inherently suspect and not susceptible to a procompetitive justification. Of particular note is *United States* v. *Brown University*, 5 F.3d 658 (3d Cir. 1993). There, the Third Circuit reversed a trial court's application of the quick look analysis to invalidate a college association's agreement to coordinate financial aid awards. In an analysis applicable here, the court of appeals pointed to the nonprofit nature of the college association and the procompetitive justifications it offered and held that a full rule of reason analysis was required. *Id.* at 678. Part II.C.

The FTC's wrongful assertion of authority here resulted in its misguided condemnation of the ethical positions at issue without a thorough analysis of their competitive consequences. The short-cut approaches taken by the FTC and the court below resulted in the invalidation of ethical canons with procompetitive effects that far exceed any imagined restraint of trade. Both holdings below chill numerous nonprofit professional associations' legitimate self-regulatory activities. See Part II.D. For these reasons, the Court should hear this case and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT ISSUE OF WHETHER THE FTC HAS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS.

A. The starting point in determining the scope of the FTC's jurisdiction is the language of the FTC Act. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). Unlike the Sherman Act, the FTC Act does not apply to all entities. Rather, section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2), explicitly limits the FTC's jurisdiction to "persons, partnerships, [and] corporations." Section 4 of the Act, 15 U.S.C. § 44, in turn, carefully defines the "corporations" that are subject to the Act. Specifically, an association is a "corporation" subject to FTC jurisdiction only if it is "organized to carry on business for its own profit or that of its members."[2]

The language of sections 4 and 5 of the FTC Act reflects Congress' intention to limit the FTC's jurisdiction to for-profit, commercial entities and associations that seek to increase the profit of such entities. That intention is best evinced by contrasting the FTC Act's jurisdictional provisions with those in the contemporaneously enacted Clayton Act. The same Congress that limited the FTC's jurisdiction to corporations

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[2] Section 4, enacted in 1914, provides:

> "Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members. 38 Stat. 717, 719.

"organized to carry on business for . . . profit" expressly made the Clayton Act (like the Sherman Act before it) applicable to *all* associations.[3] See *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together). By limiting FTC jurisdiction to corporations organized for profit while making all associations subject to the Sherman and Clayton Acts, Congress excluded nonprofit, professional associations from FTC jurisdiction and gave the federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over them.

The legislative history of the FTC Act adds force to the language. The entire thrust of the Act's history is that the Commission was created to develop expertise concerning industrial and commercial entities and thus be better able to apply national antitrust policy to such entities than would a court.[4] No representatives of professional or nonprofit associations were invited to testify about the FTC Act. Nothing in the Act's language or history in any way suggests a congressional concern with the activities of nonprofit, professional associations. *Cf. United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952) (market for medical and professional services presents issues "quite different than the usual considerations prevailing in ordinary commercial matters").

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[3] The Clayton Act (15 U.S.C. §§ 12-27), like the Sherman Act (15 U.S.C.§§ 1-7) applies to all "persons." Both statutes define "persons" to "include" all "associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." See 15 U.S.C. §§ 7, 12.

[4] See, e.g., H.R. Rep. No. 63-1142, at 18-99 (1914); S. Rep. No. 63-597, at 8-9, 11, 28 (1914). See also *Community Blood Bank of Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969)(describing legislative history).

Indeed, in 1977, when the FTC sought legislation to expand its jurisdiction to nonprofit associations, Congress refused to accede:

> Clearly, the original FTC law was not intended to cover non-business activities. . . . [T]he agency has more than enough to do in regulating business concerns without the need to expand its jurisdiction to regulate non-business groups -- groups which are completely different from business organizations in purpose, intent, and "ownership." . . . [D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the non-business activities of not-for-profit organizations that FTC regulation could have. 123 Cong. Rec. H33,622 (daily ed. Oct. 13, 1977) (remarks of Rep. Broyhill).[5]

This later legislative history "throw[s] a cross light" on the intent of Congress in 1914 that, together with the language and legislative history of the 1914 FTC Act, confirms that the FTC lacks jurisdiction over nonprofit, professional associations. See *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 412 (1972) (actions of later Congress, in combination with language and history of earlier enactment, may illuminate meaning of earlier enactment).

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[5] See also H.R. Rep. No. 95-339, at 120 (1977) (minority report) ("At the present time, the jurisdiction of the Commission is limited to profit-making bodies. The effect of this provision would have been to extend the regulatory reach of the FTC to non-profit organizations. The full Committee deleted this provision and we fully concur in the Committee's decision in this regard. In reviewing the record, we note that the FTC made a very weak case for extending its jurisdiction in this fashion. On the other hand, the non-profit groups presented a very strong case in favor of deleting the new provision.")

Despite the language and legislative history of the FTC Act, the court of appeals held that although a nonprofit, professional association "may not directly distribute 'gain' to [its] members in the same sense as a for-profit corporation," it is nonetheless a "corporation" subject to FTC regulation if "the organization provides tangible, pecuniary benefits to its members." 128 F.3d 720, 726 (1997). This ruling does violence to the plain language of the Act. The Act speaks of corporations "organized to carry on business for . . . profit" -- not associations that are "organized" as non-profits but that provide some "pecuniary benefit" for members. The lower court's omission of the words "organized to carry on business for" and its substitution of "pecuniary benefits" for the statutory term "profit" make manifest its distortion of the language of section 4.[6]

B. As the Ninth Circuit itself acknowledged, the scope of FTC jurisdiction over nonprofit, professional associations has divided the courts of appeals. 128 F.3d at 725-26. The holding below is consistent with the Second Circuit's decision in *AMA* v. *FTC*, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided court, 455 U.S. 676 (1982). However, it is squarely in conflict with *Community Blood Bank of Kansas City Area, Inc.* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969). In *AMA* v. *FTC*, this Court granted certiorari to resolve the conflict among the courts of appeals, but it divided equally and so the conflict remains.

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[6] The FTC has consistently sought to justify its assertion of jurisdiction over nonprofit professional associations by referring to cases in which this Court and the parties apparently assumed that the FTC had jurisdiction over a trade association. *See, e.g.*, *FTC* v. *Cement Inst.*, 333 U.S. 683 (1948); *Millinery Creators Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941). These cases do not suggest, contrary to the language and legislative history of the Act, that Congress intended to subject nonprofit, professional associations to FTC jurisdiction. They simply reflect the FTC's jurisdiction over the industrial and commercial businesses at issue in the prior cases.

In *Community Blood Bank* v. *FTC*, the Eighth Circuit held that a nonprofit hospital association and a community blood bank were outside the FTC's authority. The hospital association closely resembled petitioner CDA in this case. Like the CDA, it was organized as a nonprofit corporation and performed numerous eleemosynary functions. In addition, however, the hospital association served the business interests of its member hospitals -- assisting in the training and procurement of personnel, providing coordinated planning and financing, and furnishing a forum for resolving questions by pathologists. See 70 F.T.C. 728, 863-64 (1966), annulled 405 F.2d 1011 (1969). Indeed, the FTC specifically found that the association "performed very valuable services" for its members. *Id.* at 864.

Nevertheless, the Eighth Circuit recognized that the test of jurisdiction under the FTC Act is whether an entity is "organized to" carry on "*business for profit* within the traditional meaning of that language." 405 F.2d at 1018. Profit is gain from business or investment over and above expenses, not some incidental economic benefit conferred by an association's activities. Thus, the court held that whether the FTC has jurisdiction over a corporation depends on the "reality" of whether the corporation "in law and in fact" operates as a nonprofit organization. 405 F.2d at 1019. As the court observed:

> [t]he uncontradicted evidence shows, and the Commission found, that *no part of any funds received by Community and AHA have ever been distributed or inured to the benefit of any of their members*, directors or officers; *all receipts have been used exclusively for the purposes authorized by law* and their articles of incorporation; *all funds received by Community originated from gifts, loans and grants, replacement blood donations and payment of responsibility and*

> *processing fees; AHA received its funds from grants, loans, gifts and dues of member hospitals*. Of added significance is the finding that the receipts by Community have not been sufficient to meet expenses and to repay outstanding loans. *Id.* at 1020 (emphasis supplied).

Under the test applied by the Eighth Circuit, petitioner CDA would not be subject to FTC jurisdiction.

Like the Ninth Circuit, the Second Circuit has adopted an unduly expansive reading of the phrase "organized to carry on business for . . . profit." In a case involving the American Medical Association, the court held that despite that Association's myriad charitable functions and activities, the AMA also engaged in sufficient business activities to be held a proper subject of FTC jurisdiction. Specifically, the Second Circuit determined that an organization is subject to FTC authority as long as its activities provide some "economic benefit" to its members -- a test with only a tenuous connection to the statutory requirement that an entity actually be "organized to carry on business for . . . profit." In this case, the Ninth Circuit effectively adopted the Second Circuit's test when it held that a nonprofit association is within FTC jurisdiction if it "provide[s] tangible, pecuniary benefits to its members." 128 F.3d at 726.

The analysis of the Eighth Circuit in *Community Blood Bank* v. *FTC* is correct. The carefully circumscribed definition of "corporation" enacted by Congress in section 4 of the FTC Act will mean little if nonprofit associations which are organized to advance science, education, public health, professional ethics, or *pro bono* activities become subject to FTC jurisdiction any time that they offer a credit card, favorable rental car rates, or insurance benefits to members.

C. The question of the scope of the FTC's authority is of great importance to nonprofit, professional associations and the public. Since the *Goldfarb* v. *Virginia State Bar* decision in 1975, 421 U.S. 773, the FTC has made regulation of such associations a priority. The petition for certiorari lists (at page 10 n.2) numerous published FTC challenges since 1990 to activities by these associations. What the petition could not set forth, however, are the numerous nonpublic challenges to professional associations' activities that were closed, often after extensive investigations.

The FTC's persistent efforts to extend its jurisdiction beyond congressionally-prescribed limits has caused significant harm. First, every time that such an association is subjected to an FTC investigation, its limited resources are diverted from the non-profit activities for which they were intended. Second, the association's conduct is adjudicated by a tribunal which was not intended to have, and which does not have, expertise in the unique considerations involved in antitrust analysis of conduct by nonprofit, professional associations. The harmful consequences of the FTC's wrongful assertion of jurisdiction are evident here: Ethical guidelines that promote the public interest have been called into question and invalidated. Moreover, there is absolutely no need to expose professional associations and society as a whole to these costs. Nonprofit, professional associations are unquestionably subject to antitrust actions in federal court brought under the Sherman Act.

This Court should resolve the conflict in the courts of appeals and decide whether Congress gave the FTC jurisdiction over nonprofit, professional associations.

II. THIS COURT SHOULD RESOLVE THE CONFUSION OVER PROPER APPLICATION OF THE QUICK LOOK RULE OF REASON AND SHOULD HOLD THAT ETHICAL GUIDELINES HAVING PLAUSIBLE PROCOMPETITIVE EFFECTS MAY NOT BE INVALIDATED WITHOUT AN ECONOMICALLY SOUND ANALYSIS OF THE COMPETITIVE SIGNIFICANCE OF SUCH GUIDELINES.

A. The decision below cannot be reconciled with prior decisions of this Court that delineate when traditional rule of reason analysis in antitrust cases may be replaced by a "quick look" analysis. See *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *State Oil Co.* v. *Kahn*, 118 S. Ct. 275, 279 (1997). In traditional rule of reason analysis, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.). A defendant's motive is relevant -- "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.* at 238.

In *NCAA* v. *Board of Regents*, this Court permitted use of an abbreviated, or "quick look," rule of reason in certain limited situations. 468 U.S. at 109 n.39. Specifically, use of the quick look approach was restricted to the exceptional circumstance in which "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an inherently suspect restraint, *id.* at 109 (quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978)); *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (same). Here, the ethical guidelines in question -- which require additional disclosures to reduce the potential for deception in

price advertising and which express the view that certain quality claims are deceptive -- are hardly inherently suspect. If quick look analysis may be used to strike down the ethical guidelines here, it is properly applicable in any case, and the narrow exception recognized in *NCAA* v. *Board of Regents* will have swallowed the traditional rule of reason.

Equally to the point, petitioner CDA is a nonprofit, professional association which has promulgated ethical rules with an intent to further acknowledged public interests and with no intent to harm competition. This Court has repeatedly observed that "by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." *National Society of Professional Engineers*, 435 U.S. at 696. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, the Court explained that:

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether the particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. *Id.* at 788-89 n.17.

Accordingly, *NCAA* v. *Board of Regents* and *Goldfarb* v. *Virginia State Bar* and their progeny require a thoughtful analysis of how professional ethical guidelines may affect competition where, as here, those guidelines do not clearly affect price or output and may serve procompetitive purposes.

In other words, the important interests represented by petitioner's ethical rules may not be cavalierly dismissed after only a quick look unless they are plainly anticompetitive. It is wrong both to assume, as the court below did, that such guidelines are anticompetitive and to place the burden of proof on the association to show that they are not.[7]

B. The decision below also is in substantial tension with authority of this Court recognizing the procompetitive nature of efforts by professional societies to regulate deceptive or misleading advertising by their members. In *National Society of Professional Engineers*, this Court held that "the problem of professional deception is a proper subject of an ethical canon." 435 U.S. at 696. Indeed, nearly fifty years ago, this Court recognized that:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. *Semler* v. *Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935).

Responsible efforts to protect the public from deception promote the public interest and are procompetitive. See *Bates* v. *State Bar*, 433 U.S. at 384 (the professions "have a special role to play" in resolving the "problems in defining the boundary between deceptive and nondeceptive advertising" and in

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[7] An ethical guideline defining deceptive practices does not propose a commercial transaction or tout a particular product or service. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-63 n.5 (1980). Rather, it constitutes the opinion of a profession on matters of substantial public interest and importance.

assuring that advertising by professionals "flows both freely and cleanly").

The price regulation at issue forbids incomplete pricing disclosures: It requires dentists who advertise discounts to include information necessary to consumer comprehension of the discount; and it forbids claims of low prices that do not answer the question "Low compared to what?" The nonprice restrictions prohibit dentists from making claims of quality or comfort that are not verifiable.

Both rules seek to prevent misleading and deceptive advertising -- a goal which, if achieved, will promote competition by ensuring that consumers receive accurate information about services. See *Bates* v. *State Bar*, 433 U.S. at 364 ("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system") (citing *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring)).[8]

This Court has previously recognized the procompetitive and public interests served by both categories of professional self-regulation at issue, albeit in the context of First Amendment challenges to professional ethics rules. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court addressed the question whether a state ethical rule requiring attorneys to make certain pricing disclosures ran afoul of the

[8] The ethical rules at issue here bear no resemblance to the restraints of trade addressed in *National Society of Professional Engineers*, 435 U.S. at 684-85 (an ethical rule banning all competitive bidding by professional engineers), and *Indiana Federation of Dentists*, 476 U.S. at 462-63 (a concerted refusal by dentists to provide insurance companies with dental x-rays to determine whether to reimburse a patient for a particular treatment). Unlike the rules at issue in those cases, the ethical canons of the CDA have been supported by strong procompetitive justifications.

First Amendment. The Court upheld state law requirements that attorneys who advertise their willingness to represent clients on a contingent-fee basis also state the contingent-fee rate and that the client may have to bear certain expenses even if he or she loses. *Id.* at 650-653 & n.15. In so doing, the Court relied on the "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Critically for purposes of this case, the Court reasoned that disclosure requirements generally provide information of value to consumers -- *i.e.*, are procompetitive -- and should be upheld "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).

In *Bates* v. *State Bar*, the Court distinguished rules mandating that attorneys follow certain pricing practices from rules restricting attorneys' claims about the quality of their services. The Court stated that "claims as to the quality of services" may be deceptive to the public where they are "not susceptible of measurement or verification" and therefore are "so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. See also *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at 640 n.9. Ethical rules forbidding misleading and deceptive advertising promote competition by protecting the clean flow of information in the marketplace.

Finally, this Court has recognized that a practice may result in improvement in the quality of a product or a service that enhances the public's desire for that product or service and may therefore be procompetitive. See *NCAA* v. *Board of Regents*, 468 U.S. at 114-15. Both the state of California and petitioner reasonably concluded that misleading and deceptive advertising practices of dentists may well disserve the public and bring the profession into disrepute. Self-regulation of the sort at issue here makes services offered by the profession more attractive and is therefore procompetitive. *Cf. Florida Bar* v. *Went For*

It, Inc., 515 U.S. 618, 625, 635 (1995) (upholding prohibitions on attorney solicitation justified as necessary to "protect the flagging reputations of Florida lawyers" and to "prevent[] the erosion of confidence in the profession").

In sum, petitioner's ethical guidelines were supported by substantial procompetitive purposes. Use of the quick look analysis to void these guidelines was error.

C. The ruling below also conflicts with decisions of other courts of appeals which have been faithful to this Court's teaching that quick look analysis is inappropriate unless a restraint is inherently suspect and unsupported by any procompetitive justification. For example, in *United States* v. *Brown University*, 5 F.3d 658, 678 (3d Cir. 1993), the Third Circuit reversed a district court decision applying an abbreviated rule of reason analysis to a college association's agreement to award financial aid only to needy students and to set the amount of family contribution paid by commonly admitted students. In words clearly analogous here, the court held that

> [t]he nature of higher education, and the asserted procompetitive and pro-consumer features of the [agreement], convince us that a full rule of reason analysis is in order here. It may be that institutions of higher education "require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 678 (quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 788 n.17).

See also *Chicago Prof. Sports Ltd.* v. *National Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (holding that the NBA is "sufficiently integrated" that its rules governing the television broadcast of games cannot be condemned as anticompetitive without a full rule of reason analysis); *Illinois Corporate Travel,*

Inc. v. *American Airlines, Inc.*, 806 F.2d 722,727 (7th Cir. 1986) (quick look rule of reason analysis is not appropriate "[u]nless the practice 'almost always' makes consumers worse off")(citations omitted); *Vogel* v. *American Society of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (refusing to apply quick look rule of reason analysis to an ethical bylaw unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues").

D. Application of a quick look rule of reason analysis to the ethical guidelines of professional associations would expose to unwarranted antitrust condemnation legitimate pronouncements that serve the public interest. Numerous professional associations, including the American Bar Association ("ABA"), the AMA, and the ADA, promulgate ethical rules and promote ethical behavior by engaging in responsible professional self-regulation. Each of the aforementioned associations issues ethical rules designed and intended to prevent misleading and deceptive advertising.

For example, Part 7 of the ABA's Model Rules of Professional Conduct addresses lawyer advertising. Center for Prof'l Responsibility, ABA, *Annotated Model Rules of Professional Conduct* 483 (3d ed. 1996). Rule 7.1 forbids lawyers to make any "false or misleading communication"; subsection 7.1(b) defines as false and misleading any statement "likely to create an unjustified expectation about results the lawyer can achieve" and subsection 7.1(c) similarly defines any statement comparing a lawyer's services with those of any other lawyer "unless the comparison can be factually substantiated." *Id.* These prohibitions bear a close resemblance to the CDA ethical statements at issue. See also Opinion 5.02, AMA, *Code of Medical Ethics* (1994) (interpreting the prohibition of false and misleading statements to encompass incomplete pricing disclosures and subjective claims about the quality of medical

services); Section 5-A, ADA, *Principles of Ethics and Code of Professional Conduct* 8 (1995)(to same effect).

These ethical positions serve the public interest in accurate information in the marketplace, in prevention of the injuries and mistrust bred by irresponsible, inaccurate professional advertisements, and in the conservation of social resources that results from effective professional self-regulation. They are precisely the sort of practices that should not be condemned without full consideration of their purposes, their benefits, and their context -- that is, that should receive full rule of reason analysis.

* * * *

In two respects, the FTC overreached in this case: First, the FTC exceeded the proper scope of its authority by challenging the ethical rules of a nonprofit, professional association. Second, it demonstrated why Congress decided not to burden nonprofit, professional associations with administrative regulation. It condemned a responsible effort at self-regulation without any economic analysis of the regulation's effect on competition. A writ of certiorari should be granted (a) to resolve the conflict in the circuits on the scope of FTC jurisdiction over nonprofit, professional associations and (b) to resolve the conflict with precedent of this Court and other courts of appeals on proper application of the quick look rule of reason.

CONCLUSION

For all of these reasons, the petition for certiorari in this case should be granted.

Respectfully submitted,

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